

FILED BY CLERK

JUL 24 2007

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

KELLEY DIANNA TILLEY,

Appellant.

)
)
) 2 CA-CR 2006-0216
) DEPARTMENT A
)

MEMORANDUM DECISION

) Not for Publication
) Rule 111, Rules of
) the Supreme Court
)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20052877

Honorable Stephen C. Villarreal, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Kathryn A. Damstra

Tucson
Attorneys for Appellee

Robert J. Hooker, Pima County Public Defender
By Rose Weston

Tucson
Attorneys for Appellant

H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Kelley Tilley was convicted of burglary in the second degree and theft by control. The trial court suspended the imposition of sentence and placed her on probation for three years. On appeal, she challenges the trial court's refusal to allow her to explain her prior statements, which had been admitted through the testimony of another witness. Because she did not make an offer of proof below and forfeited the grounds for relief she argues here, we affirm.

¶2 We view the facts in the light most favorable to sustaining the convictions. *See State v. Newnom*, 208 Ariz. 507, ¶ 2, 95 P.3d 950, 950 (App. 2004). In July 2002, the victim's home was broken into while she was away on vacation. Several items of jewelry were taken, along with a pair of sunglasses and a Bible. The victim had previously seen Tilley in her neighborhood but had never invited her into her home. Fingerprints matching Tilley's were found on a jewelry box in the victim's home.

¶3 At trial, the state called as a witness one of the victim's neighbors, Diana A. Diana testified about a conversation she had had with Tilley in the summer of 2005. Over Tilley's hearsay objection, Diana testified that Tilley had said, "I'm sorry, I'm so sorry," and that, based on the conversation, Diana understood Tilley to have been involved in the break-in and was "sorry about that."

¶4 The next day, Tilley testified, denying ever having entered the victim's home. She also testified about the conversation with Diana, stating that, although she had been apologetic, it was "[f]or [Tilley] being blamed for this and for it just happening to [the

victim].” When Tilley’s counsel asked her to “be a little bit more specific about what [she] may have said to [Diana],” the state objected on the ground of hearsay, and the trial court sustained the objection.

¶5 Tilley first argues the trial court erred in excluding her explanation of her statements because the statements were not hearsay. We review a trial court’s decision to exclude evidence for “a clear, prejudicial abuse of discretion.” *State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App. 1994). But Tilley failed to make an offer of proof in the trial court. “Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and . . . the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.” Ariz. R. Evid. 103(a)(2), 17A A.R.S. Here, the substance of the proposed testimony is not apparent and was not made known to the court by offer of proof. Therefore, we cannot determine whether the trial court’s decision to exclude Tilley’s statements was erroneous and whether any error prejudiced her. *See State v. Towery*, 186 Ariz. 168, 179, 920 P.2d 290, 301 (1996) (“[S]omething more than speculation about possible answers is required to show prejudice.”); *State v. Williams*, 183 Ariz. 368, 380, 904 P.2d 437, 449 (1995) (absent offer of proof, court could not determine whether defendant’s statement qualified as nonhearsay).

¶6 Tilley also claims the trial court’s ruling “deprived her of her constitutional rights to testify and present a complete defense.” She did not raise this issue below and

forfeited any appellate review of the issue, absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Because Tilley did not make an offer of proof and thereby establish what her testimony would have been, she cannot sustain her burden to show prejudice in a fundamental error analysis. *See id.* ¶ 20 (defendant must show both fundamental error and prejudice); *Ayala*, 178 Ariz. at 387, 873 P.2d at 1309 (exclusion of evidence not reversible error unless it results in “prejudice . . . sufficient to create a reasonable doubt about whether the verdict might have been different had the error not been committed”).

¶7 Finally, Tilley argues the prosecutor’s mischaracterization of her statements “compounded” the trial court’s error in refusing to admit her explanation. Because we are unable to determine whether the trial court erred by refusing to admit her explanation, we cannot consider whether the prosecutor compounded the error.

¶8 For the foregoing reasons, Tilley’s convictions and placement on probation are affirmed.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge